IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 28.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Criminal Appeal No.415 of 1999

Messrs B.D.Kaitan & Co.,
rep. By Commercial Manager Bimal Modi
23-A, Netaji Subhas Road,
Calcutta-700 001 .. Appellant/Complainant

vs.

A.Ramamurthy
Proprietor
M/s Murugan Agencies
28, Anna Street,
Sengupta
Katpadi,
Vellore-632 007 .. Respondent/Accused

Prayer: This appeal has been preferred against the Judgment dated 23.2.1999, in C.C.No.74 of 1995 on the file of the Court of the First Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore.

For Appellant : Mr.R.John Sathyan

For Respondent : Mr.A.Shivakumar

JUDGMENT

This appeal has been preferred against the judgment in C.C.No.74 of 1995 on the file of the Court of First Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore.

2. The complainant has preferred a private complaint under Section 200 Cr.P.C. for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 against the accused.

3. The averments in the complaint in brief relevant for the purpose of deciding this appeal are as follows:
The complainant is the Commercial Manager of M/s B.D.Khaitan & Co., The accused is the proprietor of M/s Murugan Agencies , door No.28, Anna Street, Sengutta, Katpadi ,who is the customer under the complainant's company. On many occasions, the complainant Company had supplied the

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goods to the accused, on the basis of the orders placed by the accused to the complainant's company. The accused did not pay the entire amount of goods supplied by the complainant, after taking delivery of the same. As per the complainant's company statement of account, the accused is liable to pay a sum of Rs.17,86,617.25ps towards the said due. The accused issued cheque bearing No.ESLF-1091471 dated 1.10.1993 drawn on Indian Bank, Darapadavedu for Rs.17,86,617.25ps.

3a) When the said cheque was deposited with the Company's bank-Union Bank of India, India Exchange Branch on 4.10.1993 for collection, the said cheque was dishonoured on the ground that there is no balance in the drawer's account and also with the remark of "stop payment" which intimation was received by the complainant's company on 20.10.1993. A letter dated 30.10.1993 was addressed by the complainant's company to the accused intimating the dishonouring of cheque dated 1.10.1993 drawn by the accused for a sum of Rs.17,86,617.25ps. The said letter of intimation was duly received by the accused on 2.11.1993. In spite of said demand notice, the accused did not pay the said amount. The accused has committed an offence punishable under Section 138 of Negotiable Instruments Act. Hence, the complaint.

4. The learned counsel appearing for the respondent would represent that the complaint was preferred by the complainant before the Chief Metropolitan Magistrate, Calcutta, who made a reference to the Apex Court on the point of jurisdiction and on his representation, the Apex Court has transferred the Complaint to the Court of Chief Judicial Magistrate, Coimbatore as per order in Criminal Transfer Petition No.39 of 1994. The learned chief Judicial Magistrate, Coimbatore , after taking the complaint on file issued summons to the accused. After appearance of the accused, copies under Section 207 Cr.P.C. were furnished to the accused and when the offence was explained to the accused, the accused pleaded not guilty.

5. On the side of the complainant, P.Ws 1 and 2 were examined. Exs P1 to P20 were marked. On the side of the accused, Exs D1 to D10 were marked through P.W1 during his cross examination.

6. P.W.1 is David Padmarajan, Branch Manager of the complainant's company having branch at Coimbatore. According to P.W.1, the head office of the complainant's company is at Calcutta and that Ex P1 is the authorisation letter given by the Chairman of the complainant's company on the basis of a resolution passed in the meeting of the Board of Directors on 1.3.1993 at 2.00pm., and that complainant's company is indulged in manufacture of pesticides and that the accused who is running an agency by name Sri Murugan Agency at North Arcot District is a customer of the complainant's company and that the accused used to purchase the pesticides from the complainant's company on credit basis and that an account was maintained for the said transaction and that the pesticides were transported to Sri Murugan Agency at North Arcot District through lorry and that after the delivery of the goods, the accused used to send cheques

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for the goods purchased by him from the complainant's company and that a regular account was maintained in the complainant's company for the said transaction and that in the said transaction, a sum of Rs.17,86,617.25ps was the amount due as on 20.9.1993 and that a statement of account was furnished to the accused. Ex P2 is the copy of statement of account. After the receipt of the statement of account, the accused sent Indian Bank cheque for Rs.17,86,617.25ps under Ex P3 and that handed over the cheque to the Managing Director of the complainant's bank viz., Thiru Arvind Kaitan and that he presented the cheque in the Union Bank of India at Calcutta. Ex P4 is the counterfoil for the pay-in-slip for the deposit of the said cheque in the Union Bank of India at Calcutta Branch. The said cheque was forwarded to the Indian Bank Branch at Darapadavedu Village under Ex P5. The said branch of Indian Bank has returned the cheque to the Calcutta Branch by stating that they have received instructions for stop paymennt from the drawer of the cheque and the same was informed through Ex P6 by the head office of Union Bank of India, Calcutta Branch to the complainant's company. The fact of dishonouring of the cheque was informed to the accused through a notice Ex P7. Ex P8 is the acknowledgment for the receipt of said notice by the accused. Ex P9 is the reply sent by the accused to Ex P7 notice. Even in the reply notice, the accused has stated that the account maintained by the complainant for the transaction was not correct and that the amount paid by him were not given credit to in the account. The accused has not paid a sum of Rs.15,782.80 through Manivel or Rs.31,500/- through David Padmarajan as alleged in his reply notice. Ex P10 is the letter written by the accused dated 8.5.1993 stating about the partial discharge of the loan amount. Ex P11 is the reply for Ex P10 (Ex P11 was marked subject to the objection, since there is no acknowledgment produced on the side of the complainant). The contentions of the accused that he is not liable to pay a sum of Rs.17,86,417.25 to the complainant's company but only to a lessor amount is not correct. The accused had drawn a cheque for Rs.15,000/- dated 6.3.1993 in central Bank of India in the name of the complainant company. When the cheque was presented in the bank, the same was also dishonoured on the ground of insufficient funds. When this was informed to the accused, he had written Ex P12 letter and that he has repaid the said amount of Rs.15,000/- to the complainant's company. Ex P13 is the letter written by the accused stating that he is not liable to pay a sum of Rs.17,86,417.25ps but he is liable to pay only Rs.9,00,000/- and that he is ready to pay the same in instalments.

6a) P.W.2 Thiru G.Pandian, the Manager of the Indian Bank, Darapadavedu Branch. He would depose that the accused was maintaining the account in Indian Bank, Darapadavedu Branch and has also availed open cash credit facility to an extent of Rs.25,000/-. Ex P15 is the statement of account maintained in the said branch of Indian Bank for the period from 30.8.1993 to 31.12.1993 in respect of Sri Murugan Agencies maintained by the accused and that Ex P3 cheque was presented for collection on 1.10.1993 to his branch but the said cheque was not honoured because he received intimation from the drawer to stop payment which was also conveyed to the complainant's Union Bank of India at Calcutta branch

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through Ex P6 memo. On the date of presentation of Ex P3 cheque, there was only a balance of Rs.25,265.25ps in the account of the accused in debit balance. The said amount is liable to be paid by the accused to the bank. Even without the advice of stop payment, the bank could not have honoured the said cheque. Even on 1.10.1993 when Ex P3 cheque was presented , there was no sufficient funds available in the drawer's account.

7. When incriminating circumstances were put to the accused, the accused denied his complicity with the crime.

8. After the evidence was over on the side of the complainant, the learned trial Judge thought it fit to examine the accountant of the complainant's company and on summons, the accountant of the complainant's company by name Murugan was examined as C.W.1 and through him Exs C1 to C15 were marked.

9. After going through the evidence available on record, both oral and documentary, the learned trial Judge has come to a conclusion that an offence under Section 138 of the Negotiable Instruments Act was not made out against the accused and accordingly, the learned trial Judge has acquitted the accused under Section 255(1) Cr.P.C. Hence the appeal before this Court by the complainant.

10. Now the point for determination in this appeal is whether the offence under Section 138 of Negotiable Instruments Act has been made out against the accused to warrant conviction under the said provision of law?

11. Heard Mr.R.John Sathyan, learned counsel for the appellant and Mr.A.Shivakumar, learned counsel appearing for the respondent and considered their rival submissions.

12. Point:

Even in the reply notice sent by the accused to the notice of the complainant Ex P9, the accused has categorically stated that he is not liable to pay a sum of Rs.17,86,617.25ps because that was not the amount due as on 1.10.1993, the date of drawal of Ex P3 cheque and he has further stated that the account maintained by the complainant's company was not proper. Only under such circumstances, the learned trial Judge thought it fit to examine the accountant of the complainant's company who had maintained Ex C13 to Ex C15.

12a) C.W.1 Thiru Murugan, the accountant of the complainant's company at the fag end of his deposition in the cross examination has admitted that a sum of Rs.1,30,000/- is liable to be deducted from the sum of Rs.17,86,617.25ps and that he would, in crystal clear terms, admit that after the said amount of Rs.1,30,000/- is deducted then the amount due from the accused is not Rs.17,86,617.25ps. Under Section 138 of the Negotiable Instruments Act, the burden is on the complainant to prove that

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on the date of drawal of Ex P3 cheque, there was a debt or other liability legally enforceable was in existence. So as per the evidence of C.W1, the accountant of the complainant's company itself, on the date of drawal of Ex P3 cheque, the amount stated in the said cheque was not due to the complainant.

13. The learned counsel appearing for the complainant relying on a decision reported in R.Gopikuttan Pillai -vs- Sankara Narayanan Nair(1 (2004)BC 34 Kerala) and contended that subsequent partial discharge of the debt amount by the accused need not be taken into account for considering the guilt of the accused under Section 138 of the Negotiable Instruments Act. The learned counsel relied on the above said dictum referred to in the Negotiable Instruments Act by S.Krishnamurthi Aiyar's IX Edition, page Nos.522 and 523 which runs as follows:

> " The question is whether payments made prior to the receipt of the notice or even prior to the presentation of the cheque can be reckoned as sufficient discharge of this obligation to pay the amount. There is nothing in the language of Section 138 which precludes a Court from taking into account prior payment made-before the presentation of the cheque or before the receipt of the notice in deciding whether the amount due under the cheque has been paid. It will be open to the accused to show that he had made payment of the amount due under the cheque either before or after the presentation of the cheque /on receipt of the notice. If he satisfies the Court that within 15 days of receipt of the notice the entire amount or the outstanding amount due under the cheque had been paid and discharged, he would certainly be entitled to avoid culpable liability under section 138 of the Act. Prior discharge. . . . . even prior to the notice of demand under section 138 of the Act. . . . .must certainly be accepted as a valid defence under section 138 of the Act. The mere fact that such discharge is prior to the notice of demand or even
> prior to the presentation and dishonour of the cheque would not disentitle an accused to contend that the amount due under the cheque has been paid and discharged. The expression" the said amount of money and "within 15 days of receipt of the said notice" cannot lead a Court mechanically to the conclusion that any payment made in part or in full, prior to the date of receipt of the notice, cannot be given credit to. It would be unjust to read proviso(c) to section 138 in such a mechanical and literal manner."

From the above narration of fact, it is clear that in the case cited above,the accused had taken a plea of discharge after the drawal of cheque and before presenting the said cheque in the bank. But that is not the

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case herein. It has been proved by the evidence of C.W.1 in this case that on the date of drawal of Ex P3 cheque, the amount due to the complainant's company was not Rs.17,86,617.25ps. Section 138 of the Negotiable Instruments Act runs as follows:

> "Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:
>
> PROVIDED that nothing contained in this section shall apply unless:-
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
>
> Explanation:-For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

So to attract an offence punishable under Section 138 of the Negotiable Instruments Act, the complainant shall prove that the dishonoured cheque was drawn by the accused for a subsisting liablity on the date of drawal of the said cheque. The learned trial Judge took an enormous pain to summon the accountant of the complainant's company and examined him as C.W.1 and only from the evidence of C.W.1, the learned trial Judge has come to an unassailable conclusion that an offence punishable under Section 138 of the Negotiable Instruments Act was not proved against the accused. Under such circumstances, I do not find any illegality or infirmity in the findings of the learned trial Judge in arriving at theconclusion that the accused is not liable to be convicted under Section 138 of the Negotiable Instruments Act. Point is answered accordingly.

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13. In fine, the appeal is dismissed confirming the Judgment in C.C.No.74 of 1995 on the file of the Court of First Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore.

sg

Sd/-
Assistant Registrar,

/true copy/

Sub Assistant Registrar.

To

1.The First Additional District Judge-cum
Chief Judicial Magistrate,Coimbatore.
+ One cc to Mr. A. Shivakumar Advocate SR 12344
SSV (co)
sg 8/3/07

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